

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST DOUGLAS BREDE,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 21928

BRIEF OF THE APPELLEE

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INDEX

PAGE

JURISDICTION	1
STATEMENT OF THE CASE:	
A. Proceedings Below	2
B. Statement of the Facts	3
STATUTE AND REGULATIONS INVOLVED	7
QUESTIONS PRESENTED	9
SUMMARY OF ARGUMENT	9
ARGUMENT:	
THE ORDER TO REPORT FOR CIVILIAN WORK WAS PROPERLY ISSUED AND APPELLANT WAS NOT DENIED DUE PROCESS	10
CONCLUSION	15

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Kent v. United States,</u> 207 F.2d 234 (9th Cir., 1953)	14
<u>United States v. Lawson,</u> 337 F.2d 300 (3rd Cir., 1964) cert. denied 380 U.S. 919 (1965)	14
<u>Yaich v. United States,</u> 263 F.2d 613 (9th Cir., 1960)	13

RULES AND STATUTES

Federal Rules of Criminal Procedure:

Rule 37(a)(2)	1
-------------------------	---

United States Code:

Title 50 Appendix, Section 462(a)	1,2,7
Title 18, Section 3231	1
Title 28, Section 1291	2
Section 1294	2

OTHER

32 C.F.R., Section 1604.59	14
Section 1660.20(a)	4,7-8
Section 1660.20(b)	4,8
Section 1660.20(c)	5,8
Section 1660.20(d)	5,6,9,11,13
Section 1660.30	7

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BRIEF OF THE APPELLEE

JURISDICTION

This is a timely appeal, ^{1/} by Appellant with retained counsel, from a judgment of conviction and sentence for violation of the Universal Military Training and Service Act [Title 50 Appendix U.S.C., §462(a)]. Jurisdiction in the District Court was predicated on Title 50 Appendix U.S.C., §462(a) and Title 18 U.S.C., §3231; jurisdiction on appeal is

^{1/} A judgment of conviction and commitment was entered against the appellant, represented at all stages of the proceedings by retained counsel Clark A. Barrett, on May 23, 1967 (Record (hereinafter referred to as R.) Vol. I, p. 10) and a Notice of Appeal was filed the same day. (R., Vol. I, pp. 11-12; Fed. R. Crim. P. 37(a)(2)).

Invoked under Title 28, U.S.C., §1291 and §1294.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

The Federal Grand Jury at San Francisco, California, returned an indictment on January 18, 1967, in one count charging appellant with a violation of Title 50 Appendix U.S.C., §462(a) (R., Vol. I, pp. 1-2). Specifically, the indictment charged that "ERNEST DOUGLAS BREDE, defendant herein, on or about May 3, 1966, * * * did wilfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules and regulations and directions duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report to said board for instructions to proceed to the Los Angeles County Department of Charities, Los Angeles, California, (place of employment) to report for employment pursuant to such instructions, and to remain in such employment for twenty-four (24) consecutive months or until such time as released or transferred by proper authority."

The appellant pleaded not guilty, and following the execution of a jury waiver, the case was tried and concluded

on May 18, 1967, before the Hon. Jesse W. Curtis (R., Vol I, pp. 3,14). ^{2/} Appellant was found guilty, and on May 23, 1967, was sentenced to the custody of the Attorney General for a period of eighteen months (R., Vol. I, p. 10). This appeal followed. Appellant is presently at large on his own recognizance pending appeal.

B. STATEMENT OF FACTS:

Appellant registered with the Selective Service System at Local Board 57, San Mateo, California, on June 4, 1964, four days after his eighteenth birthday (Exhibit, ^{3/}p.2). As a practicing Jehovah's Witness, he was classified in class I-0 on September 14, 1964, (Exhibit, p. 12), and a year later, he was ordered to report for an Armed Forces Physical Examination, (Exhibit, p. 26). He was found fully qualified

^{2/} Judge Curtis ordinarily sits in the Central District of California at Los Angeles, but at the time this matter came on for trial, he was sitting as a visiting Judge in San Francisco.

^{3/} A certified and exemplified copy of appellant's Selective Service file was introduced into evidence as Plaintiff's Exhibit I (R., Vol. II, p. 11). That Exhibit was designated as part of the record on appeal (R., Vol. I, p. 15), and is before this Court as such, referred to hereinafter as Exhibit.

for induction (Exhibit, p. 38) and accordingly, processing toward a civilian work assignment in lieu of induction was commenced. Pursuant to Section 1660.20(a) of the Selective Service Regulations, ^{4/} appellant was furnished SSS Form No. 152, Special Report for Class I-0 Registrants, which provided him with an opportunity to submit three types of approved civilian work which he felt qualified to perform and which he would offer to perform in lieu of induction (Exhibit, pp. 39-42). Appellant returned the form, but did not list nor offer to perform any work whatsoever. Accordingly, pursuant to Section 1660.20(b) of the Regulations, appellant's file was forwarded to the State Director of Selective Service on December 20, 1965, for the purpose of securing from him three types of available appropriate employment for submission to appellant (Exhibit, p. 43). The State Director responded two days later (Exhibit, p. 44), and on January 3, 1966, appellant was mailed a letter listing the three types of employment which the State Director had specified (Exhibit, p. 45). Appellant returned this letter to the local board indicating that he did not wish to perform any of the jobs listed, nor any other job (Exhibit, p. 45-46).

^{4/} The Selective Service Regulations are found in the Code of Federal Regulations, Part 1600, and are hereinafter referred to as the Regulations. The pertinent provisions of Sections 1660.20(a)-(d) are set forth on pages 7-9, infra.

Accordingly, pursuant to Section 1660.20(c) of the Regulations, a meeting was held on March 14, 1966, which was attended by the appellant, the members of his local board, and a representative of the State Director. The purpose of the meeting was to endeavor to reach an agreement as to the type of civilian work appellant was to perform, but no agreement was reached with appellant because he declined to perform all of the jobs which were offered (Exhibit, p. 52). At the conclusion of the meeting, therefore, the local board reviewed appellant's file, determined that work as an Institutional Helper at the Los Angeles County Department of Charities was available, was appropriate, and was to be performed by the appellant (Exhibit, pp. 12,52).

Thereafter, on March 15, 1966, appellant was mailed a Current Information Questionnaire which he returned on March 24, 1966. In that form he listed his present occupation as parking garage cashier (Exhibit, pp. 53-54).

Following receipt of the questionnaire, the then clerk of the local board, pursuant to the provisions of Section 1660.20(d) of the Regulations, dispatched a letter to the Director of Selective Service requesting authority for the ordering of appellant to perform the work the board had determined should be performed (Exhibit, p. 55). That authorization was received on April 20, 1966, (Exhibit, p. 56-57),

and accordingly, an Order to Report for Civilian Work was mailed to appellant on April 22, 1966 (Exhibit, p. 60), his number having been previously reached for induction (Exhibit, p. 59).^{5/} The order was signed by Barbara Jones, who was employed at that point by the Selective Service System as a clerk, assigned to appellant's local board (R., Vol. II, p. 17)^{6/}

Appellant received the order, but failed to comply with it, notifying the local board by letter that as a matter of conscience, he could not perform the work required (Exhibit, pp. 63-65,67). The instant criminal proceedings ensued.

^{5/} Section 1660.20(d) of the Regulations provides that an order to report for civilian work "shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in class I-0 * * *." In general, registrants in class I-A and I-AO who have been found qualified for military service are ordered for induction in sequence on the basis of their dates of birth, with the oldest going first. 32 C.F.R. §1631.7. Class I-0 registrants are part of the same sequence, but as their Selective Service numbers, which are assigned on the basis of their birth dates, are reached, they become immediately eligible for civilian work assignment rather than induction.

^{6/} On July 17, 1961, the local board passed a unanimous resolution authorizing clerical personnel to sign all forms and orders necessary to the completion of local board business (R., Vol. II, pp. 18-20, Exhibit 2, p. 2).

STATUTE AND REGULATION INVOLVED

Title 50 Appendix U.S.C. §462(a) provides in pertinent part as follows:

* * * any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of * * * [the Universal Military Training and Service Act] or rules, regulations, or directions made pursuant to * * * [the Universal Military Training and Service Act] shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment * * *.

32 C.F.R. §1660.30 provides in pertinent part as follows:

Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under * * * the Universal Military Training and Service Act, as amended * * *.

32 C.F.R. §1660.20 provides as follows:

DETERMINATION OF TYPE OF CIVILIAN WORK
TO BE PERFORMED AND ORDER BY THE LOCAL BOARD
TO PERFORM SUCH WORK -

(a) When a registrant in Class I-O has been found qualified for service in the Armed Forces after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after a Statement of Acceptability (DD Form No. 62) has been mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which

he is qualified to do and which he offers to perform in lieu of induction into the Armed Forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(b) If the registrant fails to submit to the local types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-0, unless he has volunteered for such work.

QUESTIONS PRESENTED

Whether the Order to Report for Civilian Work which appellant refused to comply with was properly issued, and whether the failure of appellant's local board to consider his Current Information Questionnaire, which merely reflected a change in his current employment from one menial job to another, amounted to a denial of due process sufficient to relieve appellant of the duty to comply with that order.

SUMMARY OF ARGUMENT

Because it was mandatory under Selective Service Regulations that appellant's order issue upon receipt of the approval of the Director of Selective Service, his number having already been reached for induction and there being nothing further requiring the local board's consideration, it was proper for Barbara Jones, a local board clerk authorized to sign all forms and orders necessary for the completion of local board business, to issue the order over her signature without further action by the local board.

ARGUMENT

THE ORDER TO REPORT FOR CIVILIAN WORK WAS PROPERLY
ISSUED AND APPELLANT WAS NOT DENIED DUE PROCESS

It is appellant's position that the order to report for civilian work underlying this prosecution was improperly issued, and further, that he was denied both substantive and procedural due process, thereby relieving him of criminal responsibility for the offense charged in the indictment. His argument with respect to both assertions derives from the fact, uncontroverted by the Government, that following the meeting of March 14, 1966, ^{6/} between appellant, members of the local board, and a representative of the State Director of Selective Service, no further action was taken by the board itself prior to the preparation and mailing of the order in question by one Barbara Jones, who, as appellant stresses, was at that time a mere clerical employee of the board rather than the board Clerk.

As is apparent from the record before this Court, with particular reference to the Exhibit, following the March 14th meeting, appellant's processing toward a civilian work assignment

^{6/} Appellant has specifically disclaimed any procedural or substantive error concerning local board action prior to March 14, 1966, and hence the Government's brief focuses, as does appellant's, on the pertinent actions of Selective Service from that date forward.

was completed entirely by clerical personnel. Pursuant to what was apparently customary procedure, a local board clerk mailed appellant a Current Information Questionnaire on March 15, 1966, which he returned nine days later bearing the notation that he was currently employed as a parking garage cashier. Following receipt of the questionnaire, the clerk, without placing appellant's file again before the local board, routinely forwarded a letter to the Director of Selective Service which requested authorization for the ordering of appellant to perform the work which the board had determined at the March meeting he should perform. ^{7/} That authorization was received in the local board office approximately one month later, and the order was promptly mailed, having been signed by Barbara Jones.

It is the Government's position that the procedure followed, as set forth above, was entirely proper. On March 14th, the local board fully completed all of the aspects

^{7/} 32 C.F.R. §1660.20(d) requires that the Director of Selective Service approve the particular work assignment which the local board wants to make, and customarily that approval is sought by means of a form letter prepared by a clerk.

of appellant's processing which required any exercise of judgment or discretion, and there remained, accordingly, in order to complete the processing scheme established by §1660.20 of the Regulations, the mere formality of securing the Director's approval of the work they had determined appellant was to perform. As reflected in the Exhibit at page 52, the board on that date fully reviewed appellant's file together with the information he had provided at the meeting, which was to the effect that he would perform no work whatsoever, and based on such review, determined that he should be ordered to work at the Los Angeles County Department of Charities. Thereafter, nothing was added to appellant's file except the Current Information Questionnaire, and it is submitted that that did not require assessment by the local board. It merely reflected his current employment, which was essentially mental, and in view of appellant's assertion that he would not accept any assignment whatsoever from the local board, it is apparent that no useful purpose would have been served by bringing that

information to the board's attention. ^{8/}

Thus, when the Director's approval was received, there was nothing to do except issue the order, and it is submitted that even though the Regulation ^{9/} provides that "the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *," there was nothing improper in the procedure Miss Jones followed. Appellant's number had already been reached for induction, and inasmuch as under those circumstances issuance of the order was mandatory, ^{10/} it is apparent that the board should not

^{8/} Appellant has asserted that the board's failure to consider the information submitted amounted to a denial of substantive and procedural due process sufficient to relieve him of criminal responsibility for his failure to comply with their order, but it is clear that his argument in this regard is devoid of any merit. The board was certainly not required to consider essentially meaningless information, and in any event, it is apparent that appellant could not have been prejudiced thereby. And of course it is well settled that the failure of a local board to accord a registrant some procedure suggested in the Regulations which does not prejudice him will not then relieve the registrant of the duty to comply with the board's subsequent order. Yaich v. United States, 283 F.2d 613 (9th Cir. 1960).

^{9/} 32 C.F.R. §1660.20(d). (Emphasis supplied)

^{10/} 32 C.F.R. §1660.20(d) clearly requires the issuance, upon receipt of the Director's approval, of a civilian work order to any I-O registrant who at that point would already have been reached for induction had he been liable therefore.

have been required to meet again merely for the purpose of carrying out a procedural formality. ^{11/} And since all of the board's clerical personnel had been expressly authorized by the local board to sign all forms and orders necessary for completion of local board business, it follows that the order as issued was valid, ^{12/} and that accordingly, appellant must be held criminally responsible for his willful failure to comply with it.

11/ Certainly it was not incumbent upon the local board, as appellant suggests, to again determine that work was currently available in Los Angeles. They made such a determination on March 14th, and in any event, it should be absolutely clear that appellant is in no position to raise any question as to the availability of the employment he was directed to perform since he had no intention of performing it anyway.

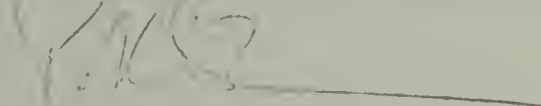
12/ Appellant, with reference to §1604.59 of the Regulations, makes much of the fact that at the time she signed the order, Barbara Jones was not "the Clerk" of the local board, but rather, was merely one of their several clerical employees. That section provides "(o)fficial papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted by * * * the local board, "but it is submitted that it should not be construed to unduly limit the authority of the local board to delegate purely ministerial functions. And in any event, it is apparent that appellant could not have been prejudiced by so slight a deviation from the precise letter of the provision, particularly in view of the fact that he had no intention of reporting in any case. See Kent v. United States, 207 F.2d 234 (9th Cir. 1953); United States v. Lawson, 337 F.2d 800 (3rd Cir. 1964), cert. denied 380 U.S. 919 (1965)

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the judgment below be affirmed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney



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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL G. SLOAN
Assistant United States Attorney

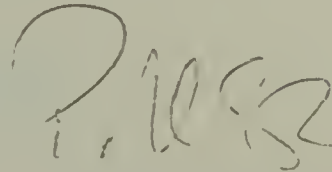
No. 21928

BREDE v. UNITED STATES

CERTIFICATE OF MAILING

This is to certify that three copies of the foregoing Brief of the Appellee were mailed this date, certified mail - return receipt requested, to Clark A. Barrett, Esq., 315 Montgomery Street, San Francisco, California, Attorney for Appellant.

DATED: January 22, 1968.



PAUL G. SLOAN
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